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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 379.

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

MARGARET V. CHAMBERLAIN, as Administratrix of the Goods, Chattels and Credits of Charles Frederick Chamberlain, deceased,
Respondent.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

MORTON L. FEAREY,
FREDERIC D. McKENNEY,
ROSCOE H. HUPPER,
Counsel for Petitioner.

(No. 37,076)

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INDEX.

PAGE

The Opinions of the Courts Below..... 1

Statement of the Case..... 1

Specification of Error..... 8

ARGUMENT.

POINT I—The Trial Court properly directed a verdict in favor of the petitioner because respondent failed to prove any collision between the nine-car draft and that of Chamberlain. Her case was not aided by petitioner's witnesses. On the contrary, all the evidence showed conclusively that the accident happened without fault on the part of the petitioner..... 9

POINT II—The Circuit Court of Appeals erred in declining to give any weight to the superior opportunity of the Trial Judge of observing the witnesses and passing on the weight of the evidence 23

Conclusion 26

Appendix, Excerpts from Bainbridge's Testimony..... 27

TABLE OF CASES CITED:

PAGE

Atchison, T. & S. F. Ry. Co. v. *Saxon*, 284 U. S. 458..10, 22
Atchison, T. & S. F. Ry. Co. v. *Toops*, 281 U. S. 351... 10
Atlantic Coast Line R. Co. v. *Davis*, 279 U. S. 34..... 10

Barrett v. *Virginian Ry. Co.*, 250 U. S. 473, 476.....19, 24
Bauer v. *Montague Mailing Machinery Co.*, 163 App. Div. 589..... 23

Chicago, M. & St. P. Ry. Co. v. *Coogan*, 271 U. S. 472, 478 .....10, 11, 19

Delaware, L. & W. R. Co. v. *Koske*, 279 U. S. 7..... 10
Dixon v. *Walker*, 206 App. Div. 565, 567-8..... 22

Gulf, M. & N. R. Co. v. *Wells*, 275 U. S. 455.....10, 13, 20
Gunning v. *Cooley*, 281 U. S. 90, 94.....19, 20, 21

Herron v. *Southern Pac. Co.*, 283 U. S. 91..... 19

Miller v. *Maryland Casualty Co.*, 40 F. (2d) 463, 465.. 24

N. Y. C. R. Co. v. *Ambrose*, 280 U. S. 486..... 10

Patton v. *Texas & Pac. Ry. Co.*, 179 U. S. 658, 660 .....10, 19, 22, 23
Pleasants v. *Fant*, 22 Wall. 116, 122.....19, 25

Robinson v. *Interurban Street Ry. Co.*, 113 App. Div. 46 23

Sloan v. *N. Y. C. R. R. Co.*, 45 N. Y. 125, 127..... 22
Slocum v. *N. Y. Life Ins. Co.*, 228 U. S. 364, 369..... 19
Small Co. v. *Lamborn & Co.*, 267 U. S. 248, 254.....19, 20
Southern Pac. Co. v. *Pool*, 160 U. S. 438, 440..... 21
Southern Ry. Co. v. *Walters*, 284 U. S. 190....10, 11, 12, 20
St. L. & S. F. Ry. Co. v. *Mills*, 271 U. S. 344..... 19

W. J. Foye Lumber Co. v. *Penn. R. Co.*, 10 F. (2d) 437, 438..... 26

AUTHORITIES CITED:

Federal Employers' Liability Act, 1908 [35 Stat. 65, U. S. Code, Title 45, Ch. 2, Secs. 51 *et seq.*]..... 1

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Respondent.

BRIEF FOR PETITIONER.

The Opinions of the Courts Below.

There was no opinion by the District Judge.

The opinion of the Circuit Court of Appeals (R. 188-192) and the dissenting opinion (R. 192-3) are reported in 59 F. (2d) 986.

Statement of the Case.

This action to recover damages for the death of Chamberlain while in performance of his duties as brakeman in petitioner's service was brought by respondent, Margaret V. Chamberlain, administratrix of the deceased, in the District Court of the United States for the Southern District of New York under the Federal Employers' Liability Act,

1908 [35 Stat. 65, U. S. Code, Title 45, Ch. 2, Secs. 51 *et seq.*] (R. 4-7). It was tried before the Honorable Harry B. Anderson, District Judge, and a jury and upon the evidence submitted by both parties, resulted in a directed verdict for the defendant, petitioner here (R. 185), and judgment in accord therewith (R. 12-13).

From such judgment appeal was taken to the United States Circuit Court of Appeals for the Second Circuit (R. 2-3) which, after hearing, reversed the judgment of the District Court, the Honorable Learned Hand and Chase, Circuit Judges, concurring (R. 188-192) and Swan, Circuit Judge, strongly dissenting (R. 192-3).

Petition for certiorari was filed September 19, 1932 and certiorari was granted October 17, 1932.

The facts involved in the case are as follows:

Deceased (hereinafter referred to as Chamberlain) was a car dropper (brakeman) employed in interstate commerce in petitioner's Eastern classification yard at West Morrisville, Pa. (R. 26-7, 62, 19).

At about 5 p. m. on November 3, 1929, Chamberlain fell from a draft of two gondola cars (R. 26, 72) which he was "dropping" from the hump to Track 14 (R. 72) leading off the ladder track east of the hump. [The track layout appears on Plaintiff's Exhibit 1—scale, 1″ to 40′ (R. 24, 65).] The procedure was to push a train load of cars in an easterly direction at a speed of 2 or 3 miles per hour over the top of the hump (R. 60, 67, 73, 127), (designated T. H. on Exhibit 1, a reduced reproduction of which is annexed to the petition for certiorari). The cars having been previously marked with their destinations were cut off just west of T. H. by a car cutter and the various cars were boarded by car droppers who controlled the movement of the cut cars by hand brakes as they coasted to the eastward from T. H. into the various classification tracks (R. 25-6, 70-1).

At about the time of the accident the following drafts moved eastward over the hump in the order given, attended by the car-droppers named:

(1) 7 cars for track 14 ridden by Jetter and Geddes (Jetter's draft) (R. 81, 87, 129, 138);

(2) 2 cars for track 14 ridden by Chamberlain (Chamberlain's draft) (R. 27, 72);

(3) 4 cars for track 20 ridden by Ashmore (Ashmore's draft) (R. 27, 43, 73, 83, 125);

(4) 9 cars for track 14 ridden by Stout at the head end, Reeves in the center and Allen at the rear (Stout's draft) (R. 27-8, 74, 152-3);

(5) 3 cars for track 14 ridden by Roberts (Roberts' draft) (R. 106).

Between drafts 1 and 2 and between drafts 4 and 5 there were intervening drafts for tracks not stated in the record (R. 81, 106).

Shortly after his draft was switched on to track 14 Chamberlain's body was found some 6 to 8 car lengths (240 to 320 ft.) east of No. 14 switch at the point marked in ink with a cross in a circle on Exhibit 1 (R. 31-2, 85, 120). The distance from the top of the hump, TH, to the switch for No. 14 track, marked "7" in Exhibit 1, is 747 feet (R. 66). The length of 14 track from that switch to the easterly end is 1,700 feet (R. 66), and it will hold approximately 40 cars. A car length as referred to in the record is 40 feet (R. 43, 96).

Respondent's theory of the accident was that Chamberlain's fall was due to a violent collision between his draft (No. 2) and Stout's draft of 9 cars (No. 4) which followed him, and the sole negligence claimed is the excessive speed of Stout's draft (R. 18). *There was no witness who saw deceased fall or testified to an actual collision between the*

two drafts. On the contrary, as the dissenting judge stated (R. 193):

> "All the witnesses who were in a position to see testified that the nine-car cut never did hit Chamberlain's."

Briefly stated, all of petitioner's employees engaged in the operation of the various drafts denied that there was any contact at all between Stout's draft and Chamberlain's draft (R. 84, 98, 118-9, 121, 133, 142, 153-4, 167, 171), and their testimony establishes that Chamberlain fell before Stout's draft had even entered track 14 (R. 132-4, 139-41, 150, 153-4).

They testified that Jetter's draft ran to within four or five car lengths of the east end of track 14, where it was anchored with several brakes; that Chamberlain's draft went down off the hump at such a high rate of speed that both Roberts and Edinger warned him to hold it; that in order to check his draft he left his position at the west end of the hind car and hurried to the east end of the first car to apply the brake there (R. 82, 103); that thereafter Chamberlain's draft continued down No. 14 track until it struck the rear end of Jetter's draft just before that draft came to a stop (R. 130, 139). Jetter and Geddes, seeing that the rider of the draft following them had disappeared, went back to find him, and he was discovered about 15 car lengths to the west just before Stout's draft reached him as he lay between the tracks (R. 132-3, 141). Petitioner's witnesses stated that Stout's draft controlled by three men at the brakes went down at the usual speed of not over 8 m. p. h. (R. 83, 94, 159). Stout saw Chamberlain lying on the ground about 10 feet away and at once checked his 9 car draft, but all the cars ran over Chamberlain's body and when they came to a stop he lay 5 to 8 feet west of the rear end (R. 98, 141, 153-4, 170) and the head end of the draft was several car lengths west of

Chamberlain's draft at that time (R. 133, 142, 155). Roberts, who was following Stout's draft with three cars, came to a stop about the same distance west of Chamberlain's body (R. 106, 121).

The only testimony that even remotely tends to support the claim that there was a collision between Stout's draft and Chamberlain's is that of Bainbridge, the plaintiff's only witness on the merits, who at about the time of the accident was standing at the point marked "B" on Exhibit 1 (R. 25, 41). He testified that he saw Chamberlain's draft going by him at 8 or 10 miles an hour (R. 27), and then stated that after an intervening draft had passed and had been shunted onto another track he saw Stout's draft go down the hump at a speed of 10 or 12 miles an hour (R. 28); that he left the point "B" and walked over to the office, a distance of about 20 feet (R. 48-9) and looked in the window (R. 49), during which time he paid no attention to Stout's draft (R. 49); that he then turned around and saw the front end of Stout's draft going in on 14 (R. 50). He did not see Chamberlain's draft go in on 14, but says that he "saw them in there" (R. 50). He estimated the speed of Chamberlain's draft at that time as "possibly three miles an hour" (R. 28-9), and claims that at the same time the head end of Stout's draft was running "around 14 or 15 miles an hour" (R. 29), at a distance behind Chamberlain's variously estimated by him as from 2 to 5 car lengths (R. 28, 29, 47, 50) and that Chamberlain was still at the same brake as when he started, namely, on the west end of the second car (R. 27, 29, 42, 51). He testified that he paid no more attention to the cars (R. 29-30) until he heard someone shout two or three minutes later (R. 30-1, 51). Upon being directly questioned as to whether he meant two or three minutes rather than seconds, he stated that he did (R. 51-3). Bainbridge testified that during the interval noted he heard a "loud crash" but that he paid no attention to it,

and admitted that the crash of cars coming together was nothing unusual (R. 30, 51-2). Cars were being run off the hump continuously and making contacts with other cars in various parts of this yard and another yard immediately adjoining to the north was being operated in the same manner (Defendant's Exhibit A, R. 176, 177). Although repeatedly admitting that he paid no attention to the crash (R. 30, 51-2), Bainbridge stated that he "glanced down there" either at once (R. 30) or "shortly thereafter" as Judge Hand stated (R. 189) or at some time within two or three minutes (R. 52). He said:

> "Q. After the crash you saw the cars drifting in on 14, were Chamberlain's cars, and the other cars separated or were they together? A. I couldn't tell that. They were all going down together, I couldn't tell whether they were coupled up or not" (R. 30-1).

He also testified that he did not see Chamberlain after the crash and after the cars were drifting in on track 14 (R. 30).

The direction from which the sound came is not definitely placed by the testimony. The so-called "crash" is not shown by the witness to have had any connection with this particular movement or the death of Chamberlain.

The accident occurred at dusk on a misty afternoon (R. 40, 71-2). Reference to the almanac shows that the sun set at 4.51 on that day. There can be no doubt that visibility was poor.

The point "B" where Bainbridge claims to have stood and first watched the cars is about 180 ft. east of the top of the hump (R. 65) and from 807 to 887 feet west of the point of the accident, if we assume that the accident occurred where Chamberlain's body was found (R. 31-2, 65-6). Track 14 makes a slight bend to the south just east of the switch and is practically in line to the east from the point "B" and the front of the yard master's office. The nine-car

draft could not have cleared the switch entirely when its first car ran over Chamberlain and the projecting ends of the cars as they made the bend to the right necessarily lessened Bainbridge's view of the cars along the north side of the string. The steep portion of the grade was west of the point where Bainbridge claims to have stood, the grade to the east being very gradual (R. 68), and it was physically impossible for Bainbridge to see over the tops of the cars when deceased was run over. If Bainbridge stood by the window of the yardmaster's office and glanced down when he heard the crash, he was then 50 feet from the track (R. 23, 66) and at least 807 feet from the point of the alleged collision (R. 31-2, 65-6). Calculations show that his angle of vision was no greater than 3° 33′, even if the bend of the track to the south be omitted from consideration.

Bainbridge not only gave the speeds of the drafts as they passed him at "B" (R. 27-8) but also attempted to estimate the speed of both Chamberlain's and Stout's draft after they had gone in on track 14 (R. 28-9, 53) a distance of over 800 feet away and with the cars moving directly away from him.

At the close of the whole case petitioner moved for a directed verdict on the ground that there was no evidence sufficient to establish the cause of action relied on in that

> (a) there was no evidence tending to establish any negligence in the premises on the part of this petitioner;
>
> (b) there was no evidence tending to prove the manner in which nor the source from which deceased received the injuries which resulted in his death;
>
> (c) the testimony of Bainbridge was too indefinite and speculative to support an inference that deceased was killed by reason of defendant's negligence and the certain and direct testimony of eyewitnesses called by defendant clearly precluded such inference (R. 63-4, 184).

The single error assigned by plaintiff in support of her appeal to the Circuit Court of Appeals questioned the propriety of the directed verdict for defendant "at the completion of the entire case" (R. 185-6).

On appeal the Circuit Court of Appeals held, by a divided Court, that the direction of a verdict for the petitioner could not stand "without intruding upon the exclusive competence of the jury" and ruled that the jury alone should "choose between a single witness whose story is neither inherently improbable, nor contradicted by evidence which cannot reasonably be disregarded, and a large number who contradict him, at least when they are in the defendant's employ, and in part concerned in the occurrence" and reversed the judgment (R. 194).

The contention of your petitioner is, in substance, that there is no evidence in the record to show that the deceased's death was caused, as averred in the complaint and in counsel's opening, by the collision of a draft of nine cars with the cars on which deceased was riding; that the testimony of all the witnesses who had knowledge of the facts was that the nine-car draft never collided with deceased's draft and that the Circuit Court of Appeals erred in holding that the case must be submitted to a jury because the witnesses who testified that there was no collision were employees of the petitioner.

Specification of Errors.

It is respectfully submitted that the Circuit Court of Appeals erred in reversing the judgment of the District Court for the following reasons:

(1) There was no evidence sufficient to support a finding that there was a collision between Chamberlain's draft and the following nine car draft proximately causing the death of decedent, and a verdict for plaintiff, if returned,

would have had to be set aside in the exercise of a sound judicial discretion.

(2) The testimony of Bainbridge was inherently improbable and was so uncertain, conjectural, circumstantial and negative as to preclude its raising a question of fact against the direct positive testimony of every witness in a position to see, to the effect that there was no collision between the drafts. The evidence was so overwhelmingly on one side as to leave no room to doubt what the fact was.

(3) In that the Court held that the case must be submitted to the jury because the testimony denying a collision was given by petitioner's employees.

(4) In that the Court refused to recognize the superior opportunity of the Trial Judge to review the weight of the evidence and held that the District Judge improperly exercised his judicial discretion in directing a verdict for petitioner.

Argument.

POINT I.

The Trial Court properly directed a verdict in favor of the petitioner because respondent failed to prove any collision between the nine-car draft and that of Chamberlain. Her case was not aided by petitioner's witnesses. On the contrary, all the evidence showed conclusively that the accident happened without fault on the part of the petitioner.

The Circuit Court of Appeals ignored the conjectural and the inherently improbable nature of the unsupported testimony of respondent's single witness, Bainbridge, whose admittedly casual observations were made at dusk from a

point at least 807 feet, or, as the Circuit Court of Appeals stated, about 900 feet (R. 189), from the scene of the accident. In so doing and in ruling that it had sufficient weight to merit consideration by a jury against the direct evidence of petitioner's witnesses, who from vantage points immeasurably superior positively disproved the inferences sought to be drawn from Bainbridge's testimony, the Court below departed from the rule laid down by this Court recognizing the right and duty of a trial court to direct a verdict for a defendant in such circumstances.

Atchison T. & S. F. Ry. Co. v. *Saxon,* 284 U. S. 458;
Southern Ry. Co. v. *Walters,* 284 U. S. 190;
Gulf, M. & N. R. Co. v. *Wells,* 275 U. S. 455;
Patton v. *Texas & Pac. Ry. Co.,* 179 U. S. 658, 660;
Atlantic Coast Line R. Co. v. *Davis,* 279 U. S. 34;
Delaware, L. & W. R. Co. v. *Koske,* 279 U. S. 7;
C. M. & St. P. Ry. Co. v. *Coogan,* 271 U. S. 472, 478;
N. Y. C. R. Co. v. *Ambrose,* 280 U. S. 486;
Atchison T. & S. F. Ry. Co. v. *Toops,* 281 U. S. 351.

The Circuit Court of Appeals expressly recognized that unless Chamberlain was thrown off his cars by a collision of the following nine cars (Stout's draft) defendant was not liable in this case (R. 189).

There was no witness who testified that there was an actual collision between the two drafts and respondent's claim that there was such a collision is based entirely on inferences sought to be drawn from circumstances not clearly proved. Every witness who was in a position to see positively testified that there was no collision and by such direct testimony affirmatively disproved the inference

sought to be drawn from the testimony of Bainbridge, the sole witness for respondent on the merits.

Southern Ry. Co. v. *Walters,* 284 U. S. 190, 194.

Bainbridge did not see Chamberlain fall. He did not see Stout's nine-car draft collide with Chamberlain's two-car draft. On the contrary, he merely represented that during periods of inattention, he saw from almost directly in the rear Stout's draft overtaking Chamberlain's draft many hundred feet away on switch track 14; that later he heard a "crash" somewhere in the yard where the impact of drafts coupling up by gravity was commonplace and that in a momentary glance he saw all the cars going down track 14 together. Track 14 curves to the south just beyond the switch. Bainbridge was at the lowest estimate 807 feet away from the point of the accident and at the point from which he claims he was looking, near the yard master's office, he was only 50 feet from the track. The angle made by the straight line of the track and a line drawn from the point of the accident to the south side of the yard master's office is only 3° 33′. As is strikingly shown by the Plaintiff's Exhibit 1, a reduced photostat of which is annexed to the petition for certiorari, Bainbridge was almost directly in the rear of the moving drafts of cars. It was physically impossible for him to see over them or along their sides so as to have any actual knowledge that the nine-car draft had come into contact with Chamberlain's.

Since proof of collision is a vital element of respondent's case and as concededly there is no direct proof to establish any impact, the circumstances from which the alleged collision can be inferred must be clearly proved.

C. M. & St. P. Ry. Co. v. *Coogan,* 271 U. S. 472.

There the Court said (p. 477):

"As there is no direct evidence, it is necessary

> to determine whether the circumstances are sufficient to warrant a finding of that fact. Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed."

Obviously Bainbridge's testimony can have no probative value unless his opportunities were such that he could correctly determine from his position the relative speeds of the two drafts he claims to have seen, the distance between them at the place of the accident and the number of cars making up the draft at the time when he saw them "all going down together" (R. 30). The physical facts demonstrate that he had no such opportunity. He was over 800 feet away, the track extended in practically a straight line ahead of him, he could not see over the tops of the cars and such view as he had was diminished by poor visibility. The language of this Court in *Southern Ry. Co.* v. *Walters*, 284 U. S. 190, 194, is pertinent:

> "It is argued that it may be inferred from the speed of the train when some of the witnesses observed it crossing other streets as well as Bond Avenue, and from a guess of the engineer as to the time required to get up such speed after a full stop, that none could have been made at Bond Avenue. But the argument amounts to mere speculation in view of the limited scope of the witnesses' observation, the down grade of the railway tracks at the point, and the time element involved. (Compare *Chicago, M. & St. P. R. Co.* v. *Coogan*, 271 U. S. 472.) Five witnesses for defendant testified that a full stop was made and the crossing flagged, and that no one was hit by the rear of the tender, which was in front of the train.
>
> An examination of the record requires the conclusion that the evidence on the issue whether the train was stopped before crossing Bond Avenue was so insubstantial and insufficient that it did not

justify a submission of that issue to the jury. *Gulf M. & N. R. Co.* v. *Wells*, 275 U. S. 455; *Kansas C. S. Ry. Co.* v. *Jones*, 276 U. S. 303; *New York Central R. Co.* v. *Ambrose*, 280 U. S. 486; *Gunning* v. *Cooley*, 281 U. S. 90, 93; *Atchison, T. & S. F. Ry. Co.* v. *Toops*, 281 U. S. 351."

The instant case is similar in certain material respects to *Gulf, M. & N. R. Co.* v. *Wells*, 275 U. S. 455. There plaintiff testified that as he was about to board the caboose of a freight train his ankle turned on a piece of coal and that at that time the engine gave the most violent jerk he had ever known. Other members of the crew testified that there was no unusual jerk. In reversing a judgment entered for the plaintiff on a jury's verdict this court said (p. 459):

> "Aside from this, Wells' statement that the jerk was given by the engine, was, obviously, a mere conjecture, as he was then at the side of the caboose, ten car lengths away, where he could not see what occurred on the engine. And his opinion that the jerk was unusual and severe as compared with those which he had previously experienced on local freight trains, had no substantial weight; his situation on the ground by the side of the moving train, after his foot had turned on the piece of coal and he had gone 'down', being plainly one in which he could not compare *with any accuracy* the jerk which he then felt with those he had experienced when riding on freight trains.
>
> In short, we find that on the evidence and all the inferences which the jury might reasonably draw therefrom, taken most strongly against the Railway Company, the contention that the injury was caused by the negligence of the engineer is without any substantial support. In no aspect does the record do more than leave the matter in the realm of speculation and conjecture. That is

not enough. *Patton* v. *Texas & Pacific Railway*, 179 U. S. 658, 663; *Chicago, M. & St. P. Railway* v. *Coogan*, 271 U. S. 478.

As the jury should have been instructed to find for the defendant, we have no occasion to consider other questions which have been argued in reference to the charge to the jury." (Italics ours.)

In the instant case it is virtually certain that even though he had looked with the closest attention Bainbridge could not have judged with any accuracy (1) the relative speeds of the cars as Stout's draft entered track 14, (2) the distance between the drafts at that time or (3) when he claims to have seen them after hearing the crash, and (4) the number of cars making up the draft as he saw them "all going down together". The sharpness of his angle of vision, the distance between Bainbridge and the place of the accident, the very gradual slope of the ground, the time of day and the weather conditions all operated to make accurate judgment of these material facts a practical impossibility. But plaintiff's case is even weaker, for on the version of the facts most favorable to plaintiff Bainbridge admittedly did not direct his attention to the movements of the drafts but gained his impressions from momentary and casual glances at the moving cars (R. 27-31, 38, 40, 44-52).* Under those circumstances, his testimony was, obviously, mere conjecture.

The unsubstantial character of Bainbridge's testimony is clearly shown in his estimates of the speed of Stout's draft, which was an essential element in respondent's effort to show that there was a collision. On his own story Bainbridge merely glanced at the cars from a position nearly directly behind them and more than 800 feet away as they ran on to track 14. Nevertheless, this witness undertook to state the speed of Stout's draft after it had entered the track and went even further in saying that although it

* Excerpts from Bainbridge's testimony are printed in the Appendix hereto annexed.

entered the track at a speed of 14 or 15 miles an hour (R. 29) it slowed down to 7 or 8 miles an hour after he heard the alleged crash (R. 53). His momentary glances could not have afforded him a basis for estimating speed and his testimony is not entitled to any weight. It is clear that his estimates as to speed were based on imagination rather than actual knowledge and it would be extraordinary if such evidence could make a case for a jury in the face of the direct and unequivocal evidence of many witnesses on behalf of petitioner that there was no collision.

On the evidence above shown the Circuit Court of Appeals would allow a jury freedom to infer that Stout's nine-car draft did in fact collide with Chamberlain's draft and upon such primary inference to build a further inference that the operation of the nine-car draft was negligent and that Chamberlain was thrown off his draft and injured by the collision. This, in the face of the positive testimony of petitioner's three brakemen on the nine-car draft (Stout, R. 154; Reeves, R. 167; Allen, R. 171), its two brakemen on the draft preceding Chamberlain's draft on track 14 (Jetter, R. 133; Geddes, R. 142), its brakeman on the three-car draft following the nine-car draft (Roberts, R. 107), and its switchman (Edinger, R. 97) that no such collision in fact occurred. All of petitioner's witnesses were in a position to definitely establish that fact one way or the other.

Jetter rode one of the forward cars in the seven-car draft that preceded Chamberlain's cut on track 14 (R. 129). He testified that prior to anchoring his draft near the east end of 14 he "felt a little jar" coming from the rear of his draft (R. 130-1); that after his cars stopped he walked to the rear of the draft and found that two cars without a rider had coupled on to the seventh car of his draft (R. 131) and that he and Geddes immediately started westward to find the missing rider. He said that he saw Chamberlain lying about fifteen carlengths to the west of

his draft, with a nine-car draft "ready to go over him" (R. 132-3). He also testified that the nine-car draft after running over deceased stopped within about nine car-lengths, still five carlengths east of the west end of Chamberlain's draft which had coupled up to his own seven-car draft (R. 133).

Geddes was riding near the rear of the seven-car draft (R. 139). He corroborated Jetter in regard to the rider-less two-car draft coming against the rear of his draft (R. 139) and stated that he found the brake club in the wheel on the head end of the head car (R. 140). Hearing Jetter shout that there was a man on the track (R. 140), he looked westward towards the switch for track 14 and saw Chamberlain on the track before the nine-car draft reached him (R. 141). He testified that in his judgment the cars were then half way between the switch and where Chamberlain lay (R. 141). He estimated that the head of the nine-car draft stopped when about six or seven carlengths from the rear of Chamberlain's draft (R. 142).

Stout, the forward brakeman of the nine-car draft, testified that just after he entered track 14 the cars ahead were at the other end of the yard (R. 153); that when his draft was about six carlengths in on track 14 he happened to glance down and saw Chamberlain lying between the rails about ten feet ahead of him (R. 153-4). He testified that he tightened the brakes immediately and brought the draft to a stop five or six carlengths from the rear end of the cars east of him (R. 154).

Allen, who rode on the rear of the last car of the nine-car draft (R. 169) testified that after he had "taken the bend" on track 14 he saw the cars ahead down at the east end (R. 169-70). Both Allen and Reeves, who was near the middle of the draft (R. 166), testified positively that their draft did not collide with any draft on the track ahead (R. 167, 171). It is inconceivable that they would not have ex-

perienced a perceptible jar if their cars had collided with a "crash" with Chamberlain's draft.

Edinger was stationed at the switch leading into track 18 (R. 80, 82) and stated that he called to Chamberlain to check the speed of his draft, as he was going too fast (R. 82); that he saw Chamberlain go to the forward end of his first car and start to work on the brake there (R. 82-3); that he watched Chamberlain's draft until he passed from sight on track 14 (R. 83) and that at the time Ashmore's four-car draft (which preceded the nine-car draft) passed the witness, Chamberlain was out of sight down track 14 (R. 83). He said that as Chamberlain was going too fast when he passed, he listened to see if he could hear anything hit down there, but that he heard nothing either before or after the nine-car draft passed him (R. 84). After the accident he went to the rear of the nine-car draft and from there judged that the head of the draft was about one carlength from the rear of the drafts at the east end of the track (R. 96-7, 101). It is to be noted that Edinger had not been to the head of the draft and had not the means of judging the distance between the cars that were available to Jetter, Geddes and Stout. His observation, like that of Bainbridge, was at so sharp an angle as to make his judgment of distance along the track unreliable.

Roberts, who rode the draft following Stout's, testified that he was coming up the hump as Chamberlain passed the yard master's office and that he called to Chamberlain to check the speed of his draft (R. 103); that he saw Chamberlain reach the east end of the head car as his draft entered track 14 (R. 105). Later he entered track 14 and stopped just short of the nine-car draft (R. 107). He observed from this position that there was an opening between the head of the nine-car draft and the cars at the east end, but declined to estimate the distance on the ground

that he had not been down to the head end of the draft (R. 107).

Petitioner's contentions are concisely stated in Judge Swan's dissenting opinion as follows (R. 193):

> "Unless the nine-car cut of cars bumped into Chamberlain's two-car cut and knocked him off, there was no evidence of negligence by the defendant. Bainbridge did not testify that he saw any such collision, he inferred that it occurred because he heard a crash and because thereafter the two strings appeared to him to be moving together. But the crash might have come from elsewhere in the busy yard, and he was in no position to see whether the two strings of cars were actually together. He repeatedly said he was paying no particular attention, and his position was such, being 900 feet from the place where Chamberlain's body was found and less than 50 feet from the side of the track in question, that he necessarily saw the strings of cars at an acute angle when they appeared to be moving together. At such an angle it would be physically impossible even for an attentive observer to tell whether the forward end of the nine-car cut was actually in contact with the rear end of the two-car cut. All the witnesses who were in a position to see testified that the nine-car cut never did hit Chamberlain's. Plaintiff's evidence was wholly circumstantial, and the inferences which might otherwise have been drawn from it were shown to be utterly erroneous, unless all the defendant's witnesses were wilful perjurers. This is not a case where direct testimony to an essential fact is contradicted by direct testimony of other witnesses, though even there it is conceded a directed verdict might be proper in some circumstances. Here, when all the testimony was in, the circumstantial evidence in support of negligence was thought by the trial

judge to be so insubstantial and insufficient that it did not justify submission to the jury. Cf. Southern Ry. Co. v. Walters, 284 U. S. 190, 194 * * *. His opinion is entitled to 'large respect' by an appellate court 'when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect.' Patton v. Texas & Pac. Ry. Co., 179 U. S. 658, 660. I think the judgment should be affirmed."

Under the facts in this case when considered in connection with the well established rule in the federal courts relative to the direction of a verdict, it seems inescapable that the direction of a verdict for petitioner by the District Court was proper. Under the federal rule a scintilla of evidence is not sufficient, but there must be reasonable and substantial evidence for the plaintiff before the case can be submitted to the jury and the evidence in favor of the plaintiff must be of such a conclusive and substantial character that if a verdict were rendered for the plaintiff the Court would not have to set it aside in the exercise of sound judicial discretion.

Pleasants v. *Font,* 22 Wall. 116, 122;
Patton v. *Tex. & P. Ry. Co.,* 179 U. S. 658, 659-60;
Slocum v. *N. Y. Life Ins. Co.,* 228 U. S. 364, 369;
Barrett v. *Virginian Ry. Co.,* 250 U. S. 473, 476;
Small Co. v. *Lamborn & Co.,* 267 U. S. 248, 254;
St. L. & S. F. Ry. Co. v. *Mills,* 271 U. S. 344;
Chicago, M. & St. P. Ry. Co. v. *Coogan,* 271 U. S. 472, 478;
Gunning v. *Cooley,* 281 U. S. 90, 94;
Herron v. *Southern Pac. Co.,* 283 U. S. 91.

In *Chicago, M. & St. P. Ry. Co.* v. *Coogan,* 271 U. S. 472, the Court said (p. 478):

"It is the duty of the trial judge to direct a ver-

dict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding. *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521, 524."

In *Gunning* v. *Cooley*, 281 U. S. 90, the Court said (p. 94):

> "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.' *Improvement Company* v. *Munson*, 14 Wall. 442, 448. *Pleasants* v. *Fant*, 22 Wall. 116, 122."

A scintilla or modicum of conflicting evidence irrespective of the character and measure of that to which it is opposed does not require the submission of the case to the jury.

> *Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 254 and cases there cited;
> *Southern Ry. Co.* v. *Walters*, 284 U. S. 190, 194;
> *Gulf, M. & N. R. Co.* v. *Wells*, 275 U. S. 455.

In *Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, the Court said (p. 254):

> "The rule for testing the direction of a verdict, as often has been held, is that where the evidence is undisputed, or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, a

> verdict may and should be directed for the other party. The view that a scintilla or modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed, necessarily requires a submission to the jury has met with express disapproval in this jurisdiction, as in many others. *Improvement Company* v. *Munson*, 14 Wall. 442, 448; *Pleasants* v. *Fant*, 22 Wall. 116, 122; *Bowditch* v. *Boston*, 101 U. S. 16, 18; *Anderson County Commissioners* v. *Beal*, 113 U. S. 227, 241; *Delaware, etc. R. R. Co.* v. *Converse*, 139 U. S. 469, 472."

If petitioner is right in its contention that on the evidence in this case it was the right and duty of the District Court to direct a verdict in its favor, the error of the Circuit Court of Appeals may only be corrected by reversing the order now under review and if not corrected the decision will have the effect of so limiting the powers of the District Courts in this circuit that petitioner and other railroads engaged in interstate transportation will be forced to submit the question of liability in personal injury cases to the decision of a jury in every case where there is the slightest evidence in favor of the plaintiff. This court has held that even in a case where the evidence is conflicting, it is the right and duty of the trial judge to direct a verdict where the evidence is "so overwhelmingly on one side as to leave no room to doubt what the fact is".

> *Southern Pac. Co.* v. *Pool*, 160 U. S. 438, 440; *Gunning* v. *Cooley*, 281 U. S. 90, 94.

Judge Swan, dissenting in the instant case, said (R. 192-3):

> "I agree that cases are not lightly to be taken from the jury; but, if ever a directed verdict for the defendant in a negligence case is to be sustained this, in my opinion, is such a case."

The importance of preserving the right of a District Court to take a case away from the jury if the evidence

under the Federal rule does not warrant its submission cannot be overestimated and is a matter of the gravest public interest to litigants generally in this circuit. As was said by this Court in *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 660:

> "At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment."

In *Atchison, T. & S. F. Ry. Co.* v. *Saxon*, 284 U. S. 458, this Court said (p. 459):

> "The cause is one of a peculiar class where we have frequently been obliged to give special consideration to the facts in order to protect interstate carriers against unwarranted judgments and enforce observance of the Liability Act as here interpreted."

We contend that the principle of these cases has not been applied by the Circuit Court of Appeals in this case.

The trial court admitted testimony as to prior contradictory statements by one of petitioner's witnesses, Jetter, who denied that he made such statements. This testimony was entitled to no probative force as evidence of the facts at issue.

> *Sloan* v. *N. Y. C. R. R. Co.*, 45 N. Y. 125, 127;
> *Dixon* v. *Walker*, 206 App. Div. 565, 567-8.

It could not properly be regarded as affecting the credibility of any other of petitioner's witnesses. Jetter's testimony was in no way indispensable. Entirely disregarding it, the petitioner's contention that the alleged collision did not occur was established by the overwhelming weight of the evidence.

POINT II.

The Circuit Court of Appeals erred in declining to give any weight to the superior opportunity of the Trial Judge of observing the witnesses and passing on the weight of the evidence.

The Circuit Court of Appeals failed to pay that respect to the ruling of the Trial Court to which it was entitled under the decisions of this Court.

> *Patton* v. *Texas & Pac. Ry. Co.*, 179 U. S. 658, 660, as quoted *supra*, page 22).

The same rule is followed in the Courts of this State.

> *Bauer* v. *Montague Mailing Machinery Co.*, 163 App. Div. 589;
> *Robinson* v. *Interurban Street Ry. Co.*, 113 App. Div. 46.

In the *Robinson* case the Court said (p. 47):

> "Upon the question of whether the learned trial court erred in setting aside a verdict we must keep in mind the rule which controls an appellate court in approaching the consideration of that question, and which requires that it should not disturb the disposition made unless it appears that the discretion vested in the trial judge has been exceeded or abused. As said in *Serwer* v. *Serwer* (71 App. Div. 415): 'When a verdict has been set aside by the

> trial court in the exercise of its discretionary power as against the weight of evidence, its determination ought not to be reversed by an appellate tribunal unless it is made to appear beyond all cavil that great injustice has been done to the defeated party, or unless there has been an abuse of discretion. (*Bannon* v. *McGrane*, 45 N. Y. Super. Ct. 517; *Slater* v. *Drescher*, 72 Hun, 425.)' And in *Silverman* v. *Dry Dock, E. B. & B. R. R. Co.* (69 App. Div. 23) it is said: 'While it may be that there was not that preponderance of evidence which would justify an appellate tribunal in setting aside the verdict in the first instance, nevertheless it will not disturb the discretion of the trial court in so doing unless an abuse of that discretion appears'."

Although there the question was as to the discretion of the trial court in setting aside a verdict, this Court has held that if on the evidence a verdict for the plaintiff would have to be set aside as against the weight of the evidence, it is the duty of the trial court to direct a verdict for the defendant (*Barrett* v. *Virginian Ry. Co.*, 250 U. S. 473, 476).

Indeed, Judge Hand, who wrote the majority opinion below, seems to have recognized that the questions presented by the two motions are the same. *In Miller* v. *Maryland Casualty Co.*, 40 F. (2d) 463 (C. C. A., 2, 1930) the Court said (p. 465):

> "The direction of, or refusal to direct, a verdict is reviewable, and the question which arises is precisely the same as that upon a motion for a new trial, as the Supreme Court has declared again and again. *Gunning* v. *Cooley*, 281 U. S. 90."

In *Barrett* v. *Virginian Ry. Co.*, 250 U. S. 473, the Court said (p. 476):

> "'It is now a settled rule in the courts of the

> United States that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts and promotes the ends of justice.' *Bowditch* v. *Boston,* 101 U. S. 16, 18; *Pleasants* v. *Fant,* 22 Wall. 116, 122; *Oscanyan* v. *Arms Company,* 103 U. S. 261, 265; *Randall* v. *Baltimore & Ohio R. R. Co.,* 109 U. S. 478, 482; *District of Columbia* v. *Moulton,* 182 U. S. 576, 582; *Hepner* v. *United States,* 213 U. S. 103, 113. And this rule is not subject to modification by state statutes or constitutions. *Indianapolis & St. Louis R. R. Co.* v. *Horst, supra; St. Louis, Iron Mountain & Southern Ry.* v. *Vickers,* 122 U. S. 360, 363; *Lincoln* v. *Power,* 151 U. S. 436, 442."

In *Pleasants* v. *Fant,* 22 Wall. 116, this Court indicated that weight must be given to the determination of the trial Judge as to whether there was substantial evidence presented on a material issue and that a distinction should be drawn between a situation where he elects to withdraw the case from the jury and one where he allows the jury to pass on the evidence. In affirming a judgment on a directed verdict the Court said (p. 120):

> "No doubt there are decisions to be found which go a long way to hold that if there is the slightest tendency in any part of the evidence to support plaintiff's case it must be submitted to the jury, and in the present case, if the court had so submitted it, with proper instructions, it would be difficult to say that it would have been an error of which the defendant could have complained here.

But, as was said by this court in the case of the *Improvement Company* v. *Munson,* recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."

See also *W. J. Foye Lumber Co.* v. *Penn. R. Co.,* 10 F. (2d) 437, 438.

CONCLUSION.

For the reasons stated in this brief it is respectfully submitted that the order under review should be reversed and the judgment of the District Court restored.

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Appendix.

EXCERPTS FROM BAINBRIDGE'S TESTIMONY.

Q. After you saw this band, as you say, just going in on 14, what if anything did you do? A. I didn't pay any more attention to it.

Q. What if anything attracted your attention? A. Well, when I heard them come together I naturally looked down—(R. 29-30).

* * * * * * *

Q. What happened when you saw the cars as you say, going east? A. I saw them drifting in on 14.

Q. What if anything attracted your attention to the cars again? A. I didn't pay any more attention to it until I heard somebody holler.

Q. After you had seen that band starting in on 14, did you hear anything? A. I heard a loud crash, yes.

Q. When you heard the crash what if anything did you do? A. I didn't pay any more attention to it (R. 30).

* * * * * * *

Q. After the crash you saw the cars drifting in on 14, were Chamberlain's cars, and the other cars separated or were they together? A. I couldn't tell that. They were all going down together, I couldn't tell whether they were coupled up or not (R. 30-1).

* * * * * * *

Q. After you saw the cars going in there, what if anything did you do? A. After I saw them going in?

Q. Yes. A. I didn't pay any attention to it anymore.

Q. After you heard the crash and you saw the cars going in, was your attention at all attracted to the cars down there? A. No, sir.

Q. Was your attention finally attracted to the accident? A. When I heard them holler.

Q. Where did the hollering come from? A. From down on 14 (R. 31).

On cross examination he said:

Q. When you got out in front of the yard office, can you approximately fix how many minutes that was before you went down to track 14? A. Well, as near as I can say, possibly 10 minutes (R. 38).

* * * * * * *

Q. You were not paying any particular attention to what was going on? A. Nothing particularly (R. 38).

* * * * * * *

Q. Now, after Chamberlain passed you, you were paying attention to the next cut? A. No, I didn't pay any attention to it.

Q. Did you pay attention to Chamberlain? A. Yes, I paid attention to Chamberlain.

Q. You watched Chamberlain, did you? A. For the minute that he passed me, yes.

Q. When you say a minute, you mean just the instant he passed you? A. For a second when he went by me.

Q. And that is the only time you were paying any attention to him, isn't that so? A. For that time, yes (R. 44).

* * * * * * *

Q. Now, during the time, from the time when Chamberlain passed you until the first car of the band of cars passed you, you had not paid any attention to where Chamberlain's cut was? A. Chamberlain, or the cut following him.

Q. What? A. Chamberlain or the other cut, I hadn't paid any attention (R. 47).

* * * * * * *

Q. How long did you stand there after you saw the band

of the cars start in on No. 14? A. Possibly 2 or 3 minutes.

Q. You have been using seconds before, do you mean two or three minutes now? A. Two or three minutes.

Q. Then you heard somebody hollering? A. Yes.

Q. Up to that time had you heard anything else? A. I heard the crash, heard the cars come together.

Q. When did you hear the crash? * * * A. After I noticed him going in on 14.

Q. How long after you noticed him going in on 14? A. Possibly a couple of seconds.

Q. At that time you were not looking down that way? A. No, sir.

Q. When you heard the crash, you didn't pay any attention to that, did you? A. I didn't pay any attention.

Q. There was nothing unusual about cars coming together? A. It was an extra loud crash; but I didn't pay any attention to it (R. 51-2).

* * * * * * *

Q. There was nothing unusual about the crash of cars coming together out there? A. It happens every day.

Q. There was nothing about this that attracted your attention to it? A. Nothing particular only it was extra loud.

Q. But at any rate, you didn't look down there after that, and you didn't go over there? A. I didn't pay any attention to it.

Q. It wasn't sufficient to attract your attention to it, was it? A. No.

Q. Then 2 or 3 minutes elapsed before you heard any hollering? A. In the meantime I glanced down there and I saw the cars running in on 14 (R. 52).